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IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1967.

No. 1239

JACKSON COUNTY PUBLIC WATER SUPPLY DISTRICT No. 1,
Petitioner,

vs.

ONG AIRCRAFT CORPORATION, CITY OF KANSAS CITY, MISSOURI, ILUS W. DAVIS, Successor to H. Roe Bartle, Mayor of Kansas City, Missouri, HUGH G. CARR, Director of Water, Kansas City, Missouri, and EARL BROSNAHAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI

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INDEX

Opinions Below 2
Jurisdiction 2
Questions Presented 2
Constitutional Provisions Involved 3
Statement 4
Reasons for Granting the Writ 8
Conclusion 16
Appendix A—Opinion of the Kansas City Court of Appeals A1
Appendix B—Judge Jensen's Opinion A10
Appendix C—Order Denying Motion for Rehearing A16
Appendix D—
Application to the Supreme Court for Order to Court of Appeals to Transfer A17
Letter of January 5 to Chief Justice Storckman A24
Contract for Water Main Extension A26
Finding of Fact Number 5, Circuit Court Opinion, Dated November 19, 1963 ..... A31
Telegram Denying Motion to Transfer A31
Appendix E—Motion for Rehearing and Reconsideration A32
Appendix F—
Order Denying Motion A35
Motion for Leave to File Motion for Rehearing and Reconsideration and Motion to Recall Mandate A36
Appendix G—Recitation of Sections 91.020 and 91.050, V.A.M.S. A38

Appendix H—Public Water Supply District No. 1 of Jackson County, Missouri, Balance Sheet, October 31, 1962 (R. Exhibit 13) A39

Appendix I—Water Districts in Missouri Having Revenue Bond Issues Guaranteed by Farmers Home Administration, March, 1967 ..... A43

Appendix J—Public Water Supply District No. 1 of Jackson County, Missouri, Balance Sheets, October 31, 1966 ..... A44

Appendix K—Transcript of Testimony of Mark Lucas, Investment Broker A47

Table of Authorities

CASES

Jackson County Public Water Supply District No. 1 v. *Ong Aircraft Corporation, et al.*, 409 S.W.2d 226 (Mo. App. 1966) 4

Saunders v. *Shaw*, 244 U.S. 317 (37 S. Ct. Rep. 638) 7

Spencer, Elbert F. v. *Village of Dekalb, Mo.*, 401 S.W. 2d 78 (Mo. S. Ct. 1966) 4, 13

Taylor v. *Dimmitt*, 78 S.W.2d 841 (Mo. Sup. 1934) 4, 5, 12, 13

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment XIV, Section 1 ..... 3, 16

Article VI 3, 16

Public Law 87-128, Section 306 ..... 4, 6, 7, 8, 9, 15

7 U.S.C.A., Section 1926 ..... 4, 7

42 U.S.C.A., Section 1492 ..... 4, 7, 9, 10

91.020, Revised Statutes of Missouri, 1959 ..... 4, 5

91.050, Revised Statutes of Missouri, 1959 ..... 4, 5

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS CITY COURT OF APPEALS

Jackson County Public Water Supply District No. 1 ("District") prays that Writ of Certiorari issue to review the judgment of the Kansas City Court of Appeals entered in the above-entitled case on October 3, 1966.

OPINIONS BELOW

The Memorandum Opinion of the Judge of the State Trial Court is unreported and is printed in Appendix B hereto.

The Opinion of the Kansas City Court of Appeals printed in Appendix A hereto, is reported at 409 S.W.2d 226 (Mo. App. 1966).

JURISDICTION

The judgment of the Kansas City Court of Appeals of Missouri was entered on October 3, 1966. Motion for rehearing was denied on December 5, 1966 (Appendix C). A Motion to Transfer to the Supreme Court was filed on January 4, 1967, and denied January 9, 1967 (Appendix D); and thereafter a Motion for Rehearing and Reconsideration on the denial of the Motion for Transfer was tendered and leave to file requested on January 19, 1967 (Appendix E). That Motion for Leave to file was denied on January 20, 1967 (Appendix F), on which date the Judgment and Opinion of the Kansas City Court of Appeals being the court of last resort became final. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

The question presented is whether a major charter city of the State of Missouri can invade the territory of an adjacent Federally financed rural water district and own, operate and maintain a competitive water system in said district to the detriment of the revenue bonds issued by that public rural water district.

This question is one of imperative public importance because it affects many similarly situated public water dis-

tricts within the State of Missouri, many of which rural water districts are federally financed through the Farm Home Administration which guarantees the revenue bonds of said rural water districts.

An additional question presented is whether the constitutional rights of a federally financed public water district and its members are impaired by an invasion of that district by an adjacent municipality, thereby reducing the district's revenue earning area and bringing about higher costs and thereby higher rates to the individuals and simultaneously placing the district in an ineligible category for further federal financing.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, U.S.C.A., Const. Amend. XIV, Section 1, which Amendment provides as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, within its jurisdiction the equal protection of the laws."

and Article VI of the Constitution of the United States which provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The statutes involved are:

91.020, Revised Statutes of Missouri, 1959.

91.050, Revised Statutes of Missouri, 1959.

The Agricultural Act of 1961, U.S.C.A., Title 7, Section 1926, Public Law 87-128, Section 306.

U.S.C.A., Title 42, Section 1492, Public Law 87-70.

The cases involved are:

Jackson County Public Water Supply District No. 1 v. *Ong Aircraft Corporation, et al.*, 409 S.W.2d 226 (Mo. App. 1966).

Taylor v. *Dimmitt*, 78 S.W.2d 841 (Mo. Sup. 1934).

Spencer, Elbert F. v. *Village of Dekalb, Mo.*, 408 S.W.2d 78 (Mo. S. Ct. 1966).

STATEMENT

Kansas City, Missouri ("City") on October 18, 1962, entered into a contract with the Ong Aircraft Corporation (Appendix E) (R. Exhibit 14) by which it agreed to have constructed, own, maintain and operate a water system in the subdivision known as Crossgates, an 80-acre tract straddling the south city limits line and the north District line at 119th Street in Jackson County, Missouri. Approximately 40 acres of said subdivision was located inside of Kansas City, Missouri, and the south 40 acres was located within the boundaries of the petitioner and south of and outside of the city limits lines.

Immediately upon the commencement of construction of the part of the water system outside of the city limits and within the petitioner's area, the District brought action in the Circuit Court of Jackson County at Independence to restrain and enjoin the construction, ownership, maintenance and operation claiming and contending that such an

invasion would be contrary to the law of Missouri and would endanger the revenue bonds of the District then outstanding or new ones which might be later sold.

A temporary restraining order was initially issued. Thereafter a temporary injunction was issued and remained in force until April 9th, 1963, at which date that injunction was dissolved.

The litigation continued on the prayer for a permanent injunction and the construction which had been nearly completed under agreements of the parties was hooked up and since said date has been owned, maintained and operated by Kansas City, Missouri.

On the 14th day of August, 1963, the Circuit Court, being the Trial Court in Missouri, issued its judgment (Appendix B) (R. 357-363) denying the injunction and after the usual after-trial motions appeal was taken to the Supreme Court of Missouri, transferred to the Kansas City Court of Appeals and the decision to which this Petition for Certiorari is directed was rendered. That decision affirmed the Trial Court's decision and among other things held that under the provision of Section 91.050, R.S.Mo., 1959 (Appendix G), a city such as Kansas City, Missouri, was legally entitled to own, operate and maintain a water system beyond its boundaries for service to persons in other municipalities. At all times during the pendency of this action there was in force and effect a decision of the Supreme Court of Missouri entitled *Taylor* v. *Dimmitt*, 78 S.W.2d 841 (Mo. 1934), which held that a municipality such as Kansas City, Missouri, could not legally own, operate and maintain an electric power system outside of its boundaries under the provision of Section 91.020, R.S.Mo., 1959 (Appendix G), an identical statute except for the words "power system" as against "water system."

This decision was called to the attention of the Kansas City Court of Appeals in petitioner's Motion for Rehearing before its decision became final and was likewise called to the attention of the Supreme Court of Missouri in the Application to Transfer and the Motion for Reconsideration before the decision of the Kansas City Court of Appeals became final. Because of said decision it was at all times the belief of the District, the petitioner herein, that such action, on behalf of Kansas City, Missouri, and cities similarly located adjacent to and supplying rural water districts, would not be permitted.

Therefore, it was not until the Supreme Court denied the motion to transfer the decision from the Kansas City Court of Appeals that petitioner thought there would be any doubt but that the Missouri Supreme Court would require the Kansas City Court of Appeals to follow its earlier decision and hold that rural water district revenue bonds should not be endangered by an illegal invasion of their territory by the larger cities having their own water supply and furnishing it to the adjacent districts.

The detrimental effect upon its revenue bonds of a water district being invaded by a municipality was described to the trial court by Mr. Mark Lucas, an investment underwriter of many years experience, and that testimony was not controverted. See Appendix K (R. 189-192) from the original transcript in the case, the summary of which testimony is described in Appendix A, page A8. The detrimental effect described by Mr. Lucas of an invasion of a federally financed quasi-public water system area by another municipality has been declared expressly illegal as a matter of public policy by the provisions of Public Law 87-128, Section 306, Subsection (b).

Petitioner raised both constitutional and statutory rights at the trial stage in the lower court, as evidenced

by the trial judge's conclusion number 6 which stated (R. 362):

> "No constitutional or statutory rights of the plaintiff have been violated or impaired by any contracts, agreements or the conduct of the defendants or any of them."

It is obvious from the above that at that time petitioner was arguing violation of constitutional rights although it must be frankly admitted that petitioner was unaware of the existence of Public Law 87-128, Laws of the 87th Congress, First Session, entitled The Agricultural Act of 1961, 7 U.S.C.A., Sec. 1926, or the amendment of that act which later occurred in 1965, and was unaware of Public Law 87-70 (Chapter 8B) otherwise known as 42 U.S.C.A., Section 1492, adopted in 1961 and amended in 1962, 1964 and 1965. The reasons that the specific Federal grounds presented in this Petition for Certiorari were not more specifically argued in the state proceeding are as follows:

A. It will be noted that the foregoing has described a typical "surprise" decision situation wherein this Court has granted certiorari where the Federal question is raised for the first time in the petition for certiorari. This exception is permitted as in this case where the Federal issue is born in the surprise and summary failure of the highest State Court to require the last resort intermediate court to follow the highest court's decision by denying a transferring or rehearing motion.[1]

B. Strangely enough, the trial court and the Kansas City Court of Appeals were well aware of the fact that petitioner, the District, was Federally financed (Appendix H, R. Exhibit 13). True, until the "surprise" decision of

1. *Saunders* v. *Shaw*, 244 U.S. 317, 320 (37 S.Ct.Rep. 638).

the Missouri Supreme Court in denying transfer, petitioners were concentrating on protecting the individual constitutional rights of its resident members as United States citizens and were unaware of the disastrous effect it might have upon other districts and the United States Government.

C. In addition, this case commenced in 1962. Since that date the Federal program has drastically changed and been expanded. The Federal question has arisen and become acute simultaneously with the trial and argument of this case in the Missouri courts (See Argument Reason No. 1, *infra*).

REASONS FOR GRANTING THE WRIT

1. The United States, through its Farmers Home Administration who has financed water districts by the guaranty of their revenue bonds and through its Housing and Home Finance Administration who has financed water districts by the loaning of money and the purchase of securities of water districts, is precariously in the position of seeing those districts in Missouri detrimentally affected and their area and fiscal security diminished.

The Agricultural Act of 1961, Public Law 87-128, provides in part as follows, Section 306, Subsections (a) and (b):

> "(a) The Secretary is also authorized to make or insure loans to associations including corporations not operated for profit and public and quasi-public agencies to provide for the application or establishment of soil conservation practices, the conservation, development, *use and control of water* and the installation or improvement of drainage facilities, all primarily for serving farmers, ranchers, farm tenants, farm laborers and rural residents and to *furnish financial*

assistance or other aid in planning projects for such purposes. No such loans shall be made or insured which would cause an association's unpaid principal indebtedness under this Section and the Act of August 28, 1937, as amended, to exceed $500,000 in the case of direct loans and $1,000,000 in the case of insured loans at any one time.

"(b) The service provided or made available through any such association shall not be curtailed or limited by inclusion of the *area* served by such association within the boundaries of any municipal corporation or other public body or by the granting of any private *franchise for similar service within such area* during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event." (Emphasis added).

U.S.C.A., Title 42, Section 1492 (b) (1), Public Law 87-70 and amendments, provides for the making of loans or the purchase of securities of local, urban political subdivisions by the Housing and Home Finance Administrator and, among other provisions, states: "All securities and loans made shall be of sound value or so secured as to assure retirement or repayment." Section 306, Subsection (b) of Public Law 87-128, quoted above, well defines the activities which would render a security or loan "unsecured" or of "unsound value".

Petitioner is federally financed and has been since 1937 by a Public Works Administration grant in the sum of $136,462.42 (Appendix H) (R. Exhibit 13), which amount has since it was granted been carried on the books of the petitioner and is at the present time so carried (See Appendix J, a copy of the petitioner's last audited statement). The petitioner is likewise eligible because of its peculiar location

and characteristics to additional financing either through the Farmers Home Administration by means of additional grants or guaranties for additional revenue bond issues or is eligible for additional financing through the purchase of its securities and obligations by or through loans from the Housing and Home Finance Administration under U.S.C.A., Title 42, Section 1492, paragraphs (a), (b) and (c). The HHFA has similar powers in urban areas as those given to the Farm Home Administration in rural areas.

Other water districts in Jackson County, Missouri, surrounding the cities of Kansas City, Missouri, Lee's Summit and Blue Springs are at present federally financed in the following manner and extent.

Jackson County Public Water District No. 13 has a revenue bond issue of $545,000 which has been guaranteed by the United States through the Farmers Home Administration and is adjacent to and may be encroached upon by the City of Lee's Summit from the west and the cities of Blue Springs and Grain Valley from the north.

Jackson County Public Water District No. 14 near the city of Lee's Summit, Missouri, has a revenue bond issue of $144,000 guaranteed by the United States through the Farmers Home Administration and is adjacent to and subject to encroachment by Lee's Summit from the west.

Jackson County Public Water Supply District No. 8 near the cities of Independence and Blue Springs has applied for a guarantee of a revenue bond issue by the United States through the Farmers Home Administration and is adjacent to and subject to encroachment by Blue Springs and Independence, Missouri.

Similar public rural water districts located in the Counties of Platte and Clay, State of Missouri, are adjacent to Kansas City, Missouri, and other cities having and fur-

nishing their water supply to said districts and said districts are subject to being encroached upon in the same manner as petitioner has been by Kansas City, Missouri.

In addition to the districts similarly situated and within the immediate area occupied by petitioner, there are many districts adjacent to and surrounding the St. Louis, Missouri, area; Columbia, Missouri and the other larger cities in Missouri. All are similarly federally financed by the guarantee of their revenue bonds by the United States through the Farmers Home Administration Department of Agriculture and detrimentally affected by potential encroachment permitted under the decision complained of.

Based upon information furnished by the Missouri Director of FHA, Department of Agriculture, Columbia, Missouri, there are approximately 87 rural water districts within the State of Missouri similarly situated as petitioner and having outstanding revenue bonds eligible for financing guaranteed by the United States.

Supported by information from Howard Bertsch, Administrator, Farmers Home Administration, Washington, D.C.:

> "The rural community water system program has rapidly gained momentum since 1961. The number of projects financed each year through F.H.A. rose from 33 in fiscal 1961 to nearly 400 in fiscal 1965.
>
> "Last year (1965) Congress again extended the authority. It raised the population limit on rural communities served to 5,500 and the cost limit on a single project from $1,000,000 to $4,000,000. It authorized grants combined with loans when necessary to build systems not so burdened with debt that their charge for service would be beyond the means of rural people in modest circumstances.

* *

"As now funded, programs authorized in 1965 and made operative in 1966 open the way for the F.H.A. to support about 1,000 projects a year within the nation's massive new effort to clear up its water problem. * * *

"* * * F.H.A. will make about 600 approvals for the fiscal year 1966 but local interest and initiative are enormous and when the 1966 fiscal year ends it is expected that about 3,000 project applications that are in some state of active processing will carry over into the fiscal year 1967,—projects representing $600,000,000 worth of progress in rural areas. * * *"[2]

Missouri's share of these applications, grants and guarantees is estimated to be 25 in number of projects in existence representing $13,000,000 in guaranteed financing and many applications pending representing several million dollars to be either granted or guaranteed through the Farmers Home Administration (See Appendix I).[3] As a matter of fact, in 1966, Missouri, in the list of states using FHA guaranties, was second only to Texas for the largest number and amount of grants and guaranties; and in the fiscal year 1967, Missouri is the leading state in such grants and guaranties.

All of these existing and prospective grants or guaranties by the United States are subject to being detrimentally affected by the encroachment of adjacent cities under the decision of the Kansas City Court of Appeals complained of in this petition. Said decision has ruled that it is legal (despite the ruling of the Missouri Supreme Court in *Taylor* v. *Dimmitt*) for a city to invade an

2. A paper presented on May 25, 1966, at the Annual Conference, Bal Harbour, Fla., by Howard Bertsch, Administrator, Farmers Home Administration, Washington, D.C.

3. From information furnished by J. Edw. Jose, State Director, and Neil T'se, Chief of Community Service, Farmers Home Administration, Parkade Plaza, Columbia, Missouri.

adjacent rural public water supply district and own, maintain and operate a water system therein thereby diminishing and cutting up a territory upon which said water district relies in order to repay its revenue bonds.

As pointed out in the foregoing reason, the petitioner has been Federally financed since 1937 by a large Public Works Administration grant. The petitioner is equally eligible for additional financing under a recently changed and ever-changing and expanding Federal policy for financing rural and urban political subdivisions. The present program consists of grants, loans, guaranties and purchases of securities. The decision of the Kansas City Court of Appeals, concerning which this petition is filed, has said that it is perfectly legal under a Missouri statute for an adjacent municipality to invade the Federally-financed political subdivision and therein own, operate and maintain a competing system.

The Kansas City Court of Appeals opinion is directly in the face of a Supreme Court of Missouri decision which said that it was illegal for a neighboring municipality to invade another municipality and therein own, operate and maintain an electric power system. It might appear from that decision that the Missouri Courts have held that there is a marked distinction between the two cases simply because one affects a power system and the other a water system. Petitioner does not think this is the Supreme Court's ruling because the *Taylor* v. *Dimmitt* decision (involving electric power) was presented, argued and discussed in connection with a recent water decision. See *Spencer* v. *Village of Dekalb*, 408 S.W.2d 78 (Mo. S. Ct. 1966), a case involving a water system. The Dekalb opinion of the Supreme Court left the *Taylor* v. *Dimmitt* decision untouched and unchanged and thereby gave it a recent affirmance.

It is evident from this petition that Missouri is now the outstanding State beneficiary of Federal financing involving the guarantee of revenue bonds. The statement also discloses that there is in excess of $13,000,000 of such guaranties presently outstanding. The decision complained of completely disregards the effect it might have upon such Federal financing. The exact reasons that brought about the Federal prohibition against the invasion of a Federally financed water district were presented to the Kansas City Court of Appeals, and in denying the injunction sought by petitioner and thereby condoning the action of the invading municipality, the Court of Appeals decision has set a precedent that endangers the United States guaranties that are presently outstanding.

It might be conceivably argued that if the Missouri courts had been presented with the Federal statutory prohibition of the Agricultural Act of 1961 in a case involving a water district whose revenue bonds had been federally guaranteed, that the courts would have reached an opposite result than that reached in the case at bar. This argument is not impressive when one considers that the Missouri courts were dealing with exactly the same facts (and justified the municipal encroachment) as the facts which caused Congress to pass the Agricultural Act of 1961 and declare that such a municipal encroachment is illegal.

The facts we are discussing are as follows:

1. A "service provided or made available through" the District;

2. The curtailment or limitation of that service by inclusion of the area served (41.59 acres—177 lots) within the boundaries of the Kansas City water system service;

3. The "granting of private franchise for similar service within such area" by means of the October 18, 1962, contract.

It will be noticed that this fact statement paraphrases the prohibition of Section 306(b) of the Agricultural Act. The Missouri state courts were well advised that petitioner was Federally financed. This should have alerted the state courts that supplementary applications for similar or additional financing might follow, whether it be for grant, guaranty or loan. The above facts should make it clear that the Federal legislative expression of the Agricultural Act is merely an expression of policy which is diametrically opposed to and absolutely contrary to the policy as expressed by the Kansas City Court of Appeals decision on the identical set of facts.

Therefore, the question that would arise in a subsequent case in which a guaranteed revenue bond was expressly involved would be, is the Missouri court going to follow the public policy as expressed by the Kansas City Court of Appeals decision or the public policy expressed by the Federal Public Law. It is for this reason that this Court should ask that the record on this State proceedings be forwarded to it and that the Missouri courts be instructed what policy should be followed. The importance of this is emphasized by the fact that Missouri, among all the states, is the dominant user of these Federal privileges.

2. The petitioner and its members, who are all citizens of the United States, are directly detrimentally affected in much the same way that the Federal government is affected as shown under reason number 1 above. The effect of the Kansas City Court of Appeals decision on the individuals and the political subdivisions of which they are a member is a direct and damaging effect while the effect

upon the Federal government is secondary or as guarantor but equally as damaging.

The constitutional rights of the individuals are impaired when the area of their water district is reduced by an invading municipality by an increase in rates resulting from the fact that less revenue is obtainable to pay the district's costs. The Kansas City Court of Appeals' decision, besides justifying the reduction of the petitioner's area, and therefore its earning power, has actually disenfranchised the petitioner and its members of the benefit of future Federal financing. The Public Federal Laws referred to in the statement empower the administrators of the FHA and the HHFA programs to finance only "secured" and "sound value investments". The Federal Public Laws define what is meant by "secured" or "sound value investments" and by permitting the violation complained of in this case, the Kansas City Court of Appeals has removed the petitioner's bonds and future bonds from the area of qualifying investments. This has occurred to petitioner and its U. S. citizen members without reference to the effect the decision might have had on water districts similarly situated and their members and without reference to the effect upon the Federal Government's guaranties. These are rights which are guaranteed to the members of the petitioning water district by the Fourteenth Amendment to the Constitution.

CONCLUSION

The decision of the Kansas City Court of Appeals has violated Article VI of the United States Constitution and in so doing has put in jeopardy the guaranties of the United States Government to the extent of at least $13,000,000. We think this is sufficient basis for a writ of certiorari to the Kansas City Court of Appeals asking that it forward

its record to the United States Supreme Court. But this decision has gone further in that it has in effect deprived the 5,000 water customers and members of this water district of future grants or future guaranties or future loans by the Federal government by its approval of a physical situation which renders the district's securities unsuitable for federal financing. This is an impairment of the Constitutional rights of those United States citizens contrary to the Fourteenth Amendment of the United States. This in itself is likewise sufficient ground for the issuing of this Court's writ.

Respectfully submitted,

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APPENDIX A

Opinion of the Kansas City Court of Appeals

IN THE KANSAS CITY COURT OF APPEALS
OCTOBER SESSION, 1966

JACKSON COUNTY PUBLIC WATER SUPPLY DISTRICT No. 1,
Appellant,

vs.

ONG AIRCRAFT CORPORATION, a Corporation, CITY OF KANSAS CITY, MISSOURI, ILUS W. DAVIS, Successor to H. Roe Bartle, Mayor of Kansas City, Missouri, HUGH G. CARR, Director of Water, Kansas City, Missouri, and EARL BROSNAHAN,
Respondents.

No. 24,337

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

The appellant, Jackson County Public Water Supply District No. 1, was organized under Chapter 247 (all statutory references are to R.S. Mo. 1959 and V.A.M.S., unless otherwise indicated), for the purpose of furnishing water to users within its district. The respondents are the City of Kansas City, Missouri, Ilus W. Davis, Mayor, successor to H. Roe Bartle, Ong Aircraft Corporation, which is a developer of the subdivisions, Hugh Carr, Director of Water of Kansas City, Missouri, and Earl Brosnahan, a private contractor, building the subdivision for the Ong Aircraft Corporation.

The appellant brought this suit in the Circuit Court of Jackson County, Missouri, to enjoin the respondents from constructing and using water supply lines in a subdivision being developed in Jackson County, Missouri, known as "Crossgates" which was located within the territorial boundaries of said appellant. The appellant claims that it has the exclusive right to supply water to that portion of the new subdivision which is within the boundaries of the water supply district. The trial court made findings of fact and conclusions of law and entered judgment denying a permanent injunction against the respondents. The appellant appealed to the Supreme Court of Missouri, which court transferred the cause to this court on the ground that it did not have jurisdiction because the record did not affirmatively disclose that the amount in dispute exceeded $15,000.00.

Many motions were filed by both parties at various steps of this proceeding, but as none of them were dispositive of any issue involved in this appeal, they will not be discussed herein. The evidence offered by each party covered a wide range but only such evidence as we believe is relevant and material will be referred to herein. The appellant will be referred to as the District and respondent, Kansas City, Missouri, as the City.

The evidence discloses that by reason of the extension of the city limits of Kansas City, Missouri, large portions of the District's original service area have been detached and turned over to the City. After each detachment, the boundaries of the District were re-established to conform to the City's city limit boundary. The most recent detachment occurred pursuant to contract of July 7, 1961, between the District and the City, and the decree of the Circuit Court of Jackson County, Missouri, validated such action as provided by law.

The final annexation and detachment established a boundary line generally along 119th Street which is the southern boundary of the City and the northern limits of the City of Grandview. Respondent Ong Aircraft Corporation is the owner of an eighty acre tract of land that lies approximately one half on each side of the 119th Street dividing line. This tract, known as Crossgates, has been subdivided into 372 building lots of which 195 are north of the boundary line in the City and 177 are south of the line in the City of Grandview, Missouri, and within the District. The 195 lots in the City are not involved in this controversy. The 177 lots in the City of Grandview are.

On October 18, 1962, a contract was entered into between the Ong Corporation and the City by the terms of which the City agreed to supply water to the 177 lots located in Grandview through the mains to be provided by Ong Corporation. Work was begun under the contract and on December 6, 1962, the District filed its injunction suit against respondents claiming the exclusive right to supply water to the Grandview portion of the subdivision by virtue of the contract with the City dated July 7, 1961, and pursuant to the provisions of Chapter 247, under which the District was organized.

It is contended by the District that the Court erred in holding that the agreement of July 7, 1961, did not create areas of mutual exclusiveness for the serving of water. The agreement of July 7, 1961, was approved, under the provisions of Section 247.160, by the Circuit Court of Jackson County, Missouri, in Cause No. 83533. The District has failed to point out and this court has failed to find any express provision in said agreement which gives to the District any exclusive right to furnish water within the area of Crossgates subdivision lying within the City of Grandview. The decree of the Circuit Court dated

July 28, 1961, approving the agreement does not mention any such express agreement nor give any such exclusive right to the District. The petition of the District for injunctive relief is not based on any such express agreement. The court finds that there is no express agreement between the District and the City giving the District exclusive right to sell water in the District.

There being no express written contract giving the District exclusive right to furnish and sell water in the District, can such contract be implied? The court is of the opinion that it cannot. Section 432.070 provides as follows:

> "No county, city, town, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

Section 432.070, above, is construed in State ex rel. City of Mansfield, Missouri, et al. v. Honorable Joe C. Crain, Judge of the Circuit Court of Wright County, Missouri, Mo. App., 301 S.W. 2d 415, the court saying at l.c. 419:

> "The injunction petition also contains a general allegation that it relied upon the assurances and agreement * * * of the City of Mansfield that said City would not compete with Se-Ma-No during the term of the franchise and contracts. It is not alleged or contended in the brief that such assurance or agreement was in writing or by ordinance. Such a general

allegation fails to state any ground for injunctive relief. Section 432.070, R.S. Mo. 1949, V.A.M.S., requires that contracts made with a city must be in writing and duly executed as therein provided. It has been repeatedly held that the requirements of this section are mandatory, not directory, and that a contract not so made is void." (Citations omitted).

On the question of implied agreement, the same court, l.c. 418, has the following to say: "* * * The fundamental basis of the cause of action stated in the injunction petition is to the effect that the City of Mansfield, by the execution of the franchise now owned by Se-Ma-No, and by executing the street lighting and pumping station contracts, *impliedly* agreed not to compete with the company in the transmission and distribution of electrical energy within said city for the term and duration of said franchise and contracts. The injunction petition does not allege, nor do the attached exhibits show, any *express agreement* that the franchise is *exclusive*, or that the city *expressly agreed not to compete* with Se-Ma-No. Under such circumstances, there can be no *implied* limitation upon the right of the City of Mansfield to construct and operate a power plant. Cases specifically so holding are Memphis Electric Light, Heat and Power Company v. City of Memphis, 211 Mo. 488, 196 S.W. 1113; City of Joplin v. Southwest Missouri Light Company, 191 U.S. 150, 24 S.Ct. 43, 48 L.Ed. 217; Kansas City Power and Light Company v. Town of Carrollton, 346 Mo. 802, 142 S.W. 2d 849. These cases review many other authorities on the subject." The court holds that there is no express or implied contract herein which would give any exclusive right to the District to furnish water in the District.

Under this same point (Point I of its brief), the District for the first time injects into the case the doctrine of "prior jurisdiction". This assignment is not contained

in the District's motion for new trial and is therefore not preserved for appellate review. Civil Rule 79.03, V.A.M.R., Mutual Finance Company, Inc. v. Auto Supermarkets, Inc., Mo. App., 383 S.W. 2d 296; Wilson v. Murch, Mo. App., 354 S.W. 2d 332; Dial v. Seven-Up Bottling Company, Mo., 373 S.W. 2d 53.

Under Point II of its brief, the District contends that the trial court erred in not holding that the City's right to supply water beyond its corporate boundaries is conditioned upon compliance with terms of Section 386.250(7) and in failing to find that the City had failed to comply with that section. This assignment is not contained in the District's motion for new trial and is therefore not preserved for appellate review. Civil Rule 79.03, V.A.M.R., Mutual Finance Company, Inc., a Corporation, v. Auto Supermarkets, Inc., Mo. App., 383 S.W. 2d 296; Wilson v. Murch, Mo. App., 354 S.W. 2d 332; Dial v. Seven-Up Bottling Company, Mo., 373 S.W. 2d 53.

The District contends that Chapter 247 gives it exclusive right to supply water within its boundaries but does not point out what section gives it that exclusive privilege or prohibits the City from supplying water into the District. Section 91.050 provides as follows:

> "Any city in this state which owns and operates a system of waterworks may, and is hereby authorized and empowered, to supply water from its waterworks to other municipal corporations for their use and the use of their inhabitants, and also to persons and private corporations for use beyond the corporate limits of such city, and to enter into contracts therefor, for such time, upon such terms and under such rules and regulations as may be agreed upon by the contracting parties."

It is obvious that the above section authorizes the City to furnish water outside its corporate limits to persons and private corporations. The section does not prohibit the City from supplying water to persons or corporations in water districts. In fact, it does not limit or restrict where the City may supply water. If the legislature had intended to restrict the City as to where it could supply water, it could easily have done so by prohibiting it from entering water districts. Since Section 91.050, above, does not restrict the areas where the City can supply water and Chapter 247 neither restricts the City from the area of the District nor gives the District an exclusive right to supply water, we find no statutory support for the District's contention.

To support its position, much reliance by the District is placed on the use of the word "boundaries" in the statute. Of course, the District has to have boundaries. So do cities, counties and states. The boundary simply designates the area comprised in the unit, whether it be district, city, county or state. As said in 11 C.J.S., Boundaries, Sec. 1, p. 538, "A boundary is a line or object indicating the limit or furthest extent of a tract of land or territory; a separating or dividing line between countries, states, districts of territory, or tracts of land. The term is used to denote the physical object which divides, as well as the line of division itself." There is nothing magical in the use of the word "boundary". It simply denotes the limits of the area involved. It has nothing to do as to whether the district has exclusive rights within its "boundary" or not. In section 91.050, supra, the words "corporate limits of such city" are used. These words mean the same thing as boundary of the city. That section expressly authorizes the City to supply water beyond the "corporate limits" or boundaries. The District pro-

duces no authority to prevent the City from entering the District or giving it the exclusive right to supply water therein.

The District contends that the trial court erred in finding that there is no actual or threatened irreparable harm caused by the action of respondents. Mr. Mark A. Lucas testified for the District that over a fifteen-year period he was connected with every bond issue the District floated and that the District was not rated by any investment service, but that the District had better than medium credit—a good credit; that their obligations, both general and special, have a ready market and are very much in demand. When questioned if the acts in issue would be detrimental or beneficial to the bondholders, he stated, "It definitely would affect the bondholder," but he did not state how and to what extent. He stated that when two thirds of the district in which customers were actually being served was surrendered by de-annexation the District's credit only suffered "slight damage". Obviously, if the de-annexation of two thirds of the district where customers were being served only caused "slight damage" to the district, the loss of right to serve water to an area of only 41.59 acres not previously served and which remained within the district for taxing purposes, would not cause the district "irreparable damage".

A Mr. Bill T. Wall, investment banker, testified for respondents that general obligation bonds were payable from an unlimited ad valorem tax levied upon taxable property within the District and that special obligation bonds are payable solely from revenues of the water system after operation and maintenance expenses have been paid and that purchasers of these bonds look to the amount produced at the time the bonds are sold.

The evidence discloses that the tract involved here consists of 41.59 acres. Since this tract is not being annexed by the City and will remain in the District for tax purposes, no loss of revenue from general taxes will result. Having water furnished therein and the subdivision developed undoubtedly would enhance the value of the land therein and increase the amount of taxes collectible. The District in the past has never received any revenue and at present time is not receiving any revenue from this area because it has never had and does not now have any customers in the area. What revenue in the future would be available to the District in this area is purely conjectural and dependent upon too many contingencies to support a claim of irreparable damage. It cannot be said, therefore, with any degree of certainty, that the District has lost revenue by reason of the contract of October 18, 1962, between the City and Ong Aircraft Corporation. The boundaries of the District remain unchanged and the District's taxing power has not been curtailed. Considering all the evidence, there is no credible evidence of any present or future irreparable damage.

The court finds that the trial court's findings of fact are supported by the evidence and are correct; that its conclusions of law are proper; and that under the law and the evidence, the District is not entitled to a permanent injunction against the respondents.

The judgment of the trial court denying the District's petition for a permanent injunction against respondents should be and is affirmed.

CROSS, P. J. and HOWARD, J. concur. BLAIR, J. not participating.

Frank W. Hayes, Special Judge